The court responded and held, in part, that petitioners' attorneys were not entitled to all of the fees requested:

> Based on this language [of the offers of judgment] and a review of the relevant arguments by counsel, I find that fees only for time incurred through the date of the June 10, 1993 offer, or 42.2 hours, should be allowed.

Pet. App. 30.

On September 2, 1993, petitioners filed a lengthy memorandum objecting to the Magistrate's Findings and Recommendations. Supp. E.R. 1-14.

The magistrate's recommendations were accepted by order of the court on October 4, 1993. E.R. 61-62. On review, the district court held:

> Plaintiffs also object to the denial of fees incurred after they accepted offers of judgement. As the magistrate found, the explicit terms of the offers dictate this result.

Pet. App. 36.

Petitioners appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court's orders without oral argument, in spite of petitioners' Motion to Reconsider hearing without oral argument. Pet. App. 13-14. The Ninth Circuit held that the offers accepted by petitioners explicitly "limit[ed] fees and costs to those *'incurred by this plaintiff prior to the date of this offer in an amount to be set by the court.'*" (Emphasis added by the court). Pet. App. 6. The court also considered and rejected Plaintiffs' policy arguments. Pet. App. 7-9.

Petitioners misstate the district court's and Ninth Circuit's holdings on page 1 of the Petition for Writ of Certiorari. The courts did not hold that the entitlement to attorney fees was cut off by Rule 68. Rather, both courts determined that the language of the offer of judgment cut off entitlement to attorney fees past the date of the offer of judgment.

Petitioners' Petition for Rehearing/Suggestion of Rehearing *en banc* was denied. Pet. App. 11-12.

REASONS FOR DENYING THE WRIT

This case fails to meet criteria set forth in Rule 10 of the Rules of the Supreme Court for granting writ of Certiorari. Petitioner has failed to identify any conflict between circuits, and there are no important questions of federal law that warrant review by this Court.

Generally, prevailing plaintiffs in civil rights cases filed under 42 U.S.C. §§ 1983 and/or 1988 are allowed to recover attorney fees for efforts made while litigating the amount of attorney fees.[2] It is equally well established that settlement offers made pursuant to Rule 68 may be conditioned upon waiver of such costs and fees. *Evans v. Jeff D.*, 475 U.S. 717, 737-38, *reh'g denied*, 476 U.S. 1179 (1986); *Rice v. Gates Rubber Co.*, 584 F.2d 135, 136-37 (6th Cir. 1978); *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 132 (10th Cir. 1980); *Jones v. Federated Department*

[2] *See generally, Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986); *Thompson v. Gomes*, 45 F.3d 1365, 1366 (9th Cir. 1995).

Stores, Inc., 527 F. Supp. 912, 921 (S.D. Ohio 1981); *Cantor v. Detroit Edison Co.*, 86 F.R.D. 752, 762-63 (E.D. Mich. 1980). This case is properly evaluated in the latter category. Petitioners accepted a Rule 68 offer of judgment which by its terms waived their rights to fees and costs incurred, for any reason, after the date of the offer.

The purpose of Rule 68 is to encourage settlement and its application is entirely appropriate in civil rights cases. *Marek v. Chesny*, 473 U.S. 1, 10-11 (1985); *see also, Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9th Cir. 1993). Rule 68 cuts off the award of fees incurred after an offer of judgement, regardless of whether they are merits fees or "fees on fees."[3] *Lang v. Gates*, 36 F.3d 73 (9th Cir 1994).

There are two basic scenarios that may result after an offer of judgment. If the offer is declined, the analysis focuses on whether the plaintiff ultimately recovers less than the offer. If the plaintiff recovers less than the rejected offer, the plaintiff's right to attorney fees is cut off past the date of the offer. Plaintiff will only get fees for work done prior to the offer; plaintiff gets no fees for work done after the offer, whether on the merits or in litigating the fees. The present case is different, as it deals with an accepted offer of judgment.

If the offer is accepted, the offer is treated like a contract and read as such. *Herrington v. County of Sonoma*,

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[3] "Fees on fees" is a term often used to characterize litigation concerning the amount of attorney fees. For case law supporting the operation of Fed. R. Civ. P. 68 *see, e.g., Lang v. Gates*, 36 F.3d 73 (9th Cir. 1994).

12 F.3d at 907. The terms of the offer control ultimate resolution of the issues, and a reviewing court will only resort to Rule 68 or other mechanisms when the terms of the offer are ambiguous. *Erdman v. Cochise County Ariz.*, 926 F.2d 877, 890 (9th Cir. 1991). There is no authority holding that an offering defendant can not limit attorney fees to the pre-offer period. Instead, existing authority suggests that the courts will uphold a clear limitation on attorney fees and costs.[4]

In this case, the terms of the offers were clear. The offers were twofold. First, petitioners would receive a certain sum of money plus the costs and fees incurred prior to the date of the offer. Second, the amount of reasonable costs and fees would be set by the court, in its discretion, after the submission of attorney fees by petitioners.

I. There is no conflict between the circuits on the issues presented on appeal.

Petitioners begin by arguing that fee shifting is a critical part of civil rights statutory law guaranteeing civil rights plaintiffs access to the judicial process. However, the bulk of Petitioners' arguments and cited case law deals with *rejected* Rule 68 offers. Petitioners in this action

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[4] In addition to the cases cited herein, *see Jones v. Federated Department Stores, Inc.*, 527 F. Supp. 912 (S.D. Ohio 1981); *Witcher v. Town of Matthews*, 136 F.R.D. 582 (W.D. N.C. 1991); *Said v. Virginia Commonwealth University*, 130 F.R.D. 60 (E.D. Va. 1990); *Muckleshoot Tribe v. Puget Sound Power & Light*, 875 F.2d 695 (9th Cir. 1989).

accepted the Rule 68 offers of judgment and are bound by the terms of the offers.

It is inconsequential that courts have generally encouraged fee recovery for efforts aimed at recovering attorney fees. Petitioners' Petition 8-9.[5] The offers of judgment at issue unambiguously provided that, if accepted, petitioners would receive a lump sum, plus their costs and fees incurred prior to the offer, and that the court would determine the reasonable amount of costs and fees. This case is factually distinguishable from those cases where plaintiffs were required to litigate fees in the absence of an offer of judgment or when an offer of judgment was rejected.

Moreover, petitioners misstate the circumstances surrounding the post-offer negotiations and ignore this Court's analysis in *Marek v. Chesny*, 473 U.S. 1 (1985). Petitioners assert that, as a result of the Ninth Circuit's decision, civil rights litigation will become extremely unattractive to private practitioners because fees will be diluted as a result of "bad faith" litigation over fees designed to run up costs. Pet. Br. 8, 10. In this case, the terms of the offer mandate quick and easy resolution and do not require any negotiation between the parties. The offer mandates that the court – not the parties – set the amount of costs and fees recoverable. Moreover, the impact of Rule 68 application to civil rights cases has already been addressed and resolved by this Court in *Marek*. 473 U.S. 10-11.

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[5] Petitioners' petition for writ of certiorari will be hereinafter abbreviated as "Pet. Br."

Petitioners also maintain that inconsistencies exist in the application of Rule 68 in the Fourth and Ninth Circuits, citing the Fourth Circuit's decision in *Trimper v. City of Norfolk*, 58 F.3d 68 (4th Cir. 1995), *cert. denied*, ___ U.S. ___, 133 L.Ed.2d 440 (1995). Any conflicts between the Fourth and Ninth Circuit are imaginary. The court in *Trimper* focused on the general rule that it is within a court's discretion to reduce attorney fees after an offer of judgment has been accepted. 58 F. 3d at 70-77. The Fourth Circuit did not address the impact of acceptance of an offer that unequivocally limits the amount of costs and fees recoverable to those incurred prior to the offer of judgment.

II. Petitioners have not presented any important questions of federal law or statutory construction for resolution.

Petitioners also seek review by asserting that their claim involves "proper application of canons of statutory construction to the federal rules of civil procedure." Pet. Br. 12. Petitioners' arguments in this portion are tautological and admittedly lack judicial authority. Pet. Br. 13.

The last sentence of Rule 68 allows defendants in a bifurcated trial, after the resolution of the first portion, to make an offer of judgment which will have the same effect as if the offer of judgment had been made before trial. Fed. R. Civ. P. 68.

Petitioners' emphasis on the last sentence of Rule 68 is puzzling because that sentence deals with *rejected*

offers. Nevertheless, petitioners assert that the last sentence of Rule 68 applies, and in fact, mandates a different result. Petitioners seem to be arguing that defendants have two options, either they specify an exact amount of attorney fees recoverable, or they submit a second offer of judgment to cut off fees and costs.

Rule 68 offers of judgment need not specify an exact amount for costs and attorney fees; the fees may be determined by a court. Defendants can "choose whether to make an all-inclusive lump-sum offer or name a damages figure and allow fees to be added later." *Erdman v. Cochise County Ariz.*, 926 F.2d at 880 (citing *Marek*, 473 U.S. at 6 ("it is immaterial whether the offer recites that costs are included, whether it specifies the amount * * * or, for that matter, whether it refers to costs at all.")). Adopting petitioners' proposed interpretation would force defendants to include an exact amount of fees and costs, resulting in the imposition of an entirely new duty on defendants.

In the alternative, petitioners assert that defendants should make a second offer for attorney fees and costs to cut off fees and costs. Pet. Br. 13-15. Taking petitioners' arguments to their logical conclusion, defendants could be forced to make endless offers of judgment. The first would set basic liability. The second would set attorney fees, unless of course, the amount of fees-on-fees up to the second offer was disputed. In which case, defendants would have to make a third offer cutting off the fees-on-fees-on-fees. Each successive offer would be ineffective to cut off attorney fees-on-fees unless the parties agreed to a specified amount. This ridiculous result makes petitioners' position indefensible.

III. The Court's decision in *Marek v. Chesny* is not imperilled by the Court's recent decision in *Fogerty v. Fantasy Inc.*

Petitioners assert that this Court's decision in *Fogerty v. Fantasy Inc.*, 510 U.S. ___, 127 L. Ed. 2d 455 (1994) poses a threat to civil rights fee shifting after Rule 68 offers, an issue resolved previously in *Marek v. Chesny, supra.* Petitioners do not, however, explain how *Fogerty* could impact resolution of the issues on appeal.

Petitioners misrepresent any potential impacts of *Fogerty*. To begin, *Fogerty* dealt with a *rejected* offer of judgment and, as such, is factually distinguishable from the issues at hand.

Moreover, assuming *Fogerty* is remotely relevant, Petitioners misstate the possible impact. 17 U.S.C. § 505, the statute at issue in *Fogerty*, is dramatically different in both structure and intent than the civil rights statutes petitioners contend will be affected. *Fogerty v. Fantasy*, 127 L. Ed. 2d at 462-73. As a result, it is unlikely that *Fogerty* will result in the repercussions petitioners advance.

CONCLUSION

The petition should be denied.

DATED this 22nd day of May, 1996.

Respectfully submitted,

LEHNER, MITCHELL, RODRIGUES & SEARS

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